

A. Duie Pyle, Inc. and International Brotherhood of Teamsters, Local 312 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 4-CA-10441-1 and 4-CA-10441-3

August 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND JENKINS

On July 22, 1980, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a brief in support thereof and in answer to Respondent's exceptions, and Respondent filed an answering brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Robert Touchton's picket line conduct was sufficiently egregious to render him unsuitable for further employment, but that Respondent had violated Section 8(a)(1) by its discharge of striker James Scott. While we agree with the Administrative Law Judge's finding that Respondent's discharge of Scott was unlawful, we also find, contrary to the Administrative Law Judge, that Respondent's discharge of Robert Touchton was a violation of Section 8(a)(1) of the Act.²

I. Robert J. Touchton

On May 31, 1979, the Union was picketing Respondent's Parkesburg facility. At 5:45 p.m., one of the Parkesburg employees, warehouseman-truck-driver Edward Givler, saw two cars at the main gate, one of which belonged to striker James Touchton.³ Later, at 9 p.m., Givler and Ken Rams-

bottom, a security guard, heard a noise that sounded like people beating on a steel surface, at the entrance of the road to Respondent's plant, where the picket line was located. Givler accompanied Ramsbottom and his guard dog down toward the road to see what was happening. Givler stayed back about 300 feet while Ramsbottom went closer. Givler heard Touchton yell to inquire if Ramsbottom had a dog. When Ramsbottom came within 10 feet of him, Touchton threatened to shoot the dog. Touchton then yelled, at a distance of 300 feet, "Givler, your house is on fire," and "if it is not now, it will be Saturday."⁴ Touchton then repeated the first remark about Givler's house being on fire twice more within the next few minutes, and called Givler a bastard. Givler never saw Touchton, but recognized him by his voice, and by the fact that he had seen Touchton's car near the picket line. Shortly after the incident, Ramsbottom called his superior, who in turn called the police. Givler also reported the incident to Respondent's president the same evening. The next day, June 1, Respondent sent a letter to Touchton stating that Respondent was investigating the May 31 incident and that Touchton would be notified in terms of disciplinary action including possible discharge. Respondent discharged Touchton on June 11.

The Administrative Law Judge found that Touchton knowingly made a serious threat to Givler by stating that he would burn Givler's house down. The Administrative Law Judge based this finding upon the uniqueness of Givler's historic home, which was built in 1736. The Administrative Law Judge concluded that such a threat was the "coercive equivalent of the 'accompanying physical acts or gestures'" which the Board requires to support a lawful discharge based upon verbal abuse or threats to nonstrikers. He therefore recommended that the complaint allegations as to Touchton be dismissed.

Not every act of impropriety committed by a striking employee is deemed sufficient to place that employee outside the protection of the Act. *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975). The Board has differentiated between those cases in which employees have arguably exceeded the bounds of lawful conduct during a strike in a "moment of animal exuberance"⁵ from those cases in which the

¹ The General Counsel and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² We note that in fn. 2 of his Decision, the Administrative Law Judge inadvertently refers to Touchton as "Tipton."

³ Givler had previously worked with Touchton at the West Chester facility, before transferring to his present job at Parkesburg. During that

period, Givler and Touchton had carpooled to work daily for 3-1/2 years.

⁴ Only Ramsbottom heard the latter remark.

⁵ In asserting that this is not an incident involving "animal exuberance," the dissent relies heavily on the facts that the Parkesburg employees were not on strike and that Givler was not a striker replacement or a former striker who had abandoned the strike. We believe that these facts are not significant, as the issue is not whether Touchton's remarks could

Continued

misconduct is so flagrant or egregious as to require subordination of the employees' protected rights in order to vindicate the broader interests of society as a whole. Thus, an employer is not entitled to discharge a striker for engaging in threats unless the threats are accompanied by "physical acts or gestures" that would provide added emphasis or meaning to the striker's words sufficient to warrant finding that the striker should not be reinstated to his job at the strike's end. Here, there were no such gestures or physical acts.

We find nothing inherent in the circumstances of this case which would cause us to reach a different conclusion.⁶ Thus, we disagree with the Administrative Law Judge that a threat of arson should be analyzed under a different standard than other threats, or that the historical value of Givler's home requires a different result. We find that Touchton's picket line threat, while ill-considered and not to be condoned, was not sufficiently egregious to deny Touchton reinstatement.⁷ We therefore conclude that Robert Touchton was discharged in violation of Section 8(a)(1) of the Act, and we shall accordingly order his reinstatement.

be perceived by him, or others, as justified by prior events. In any event, we note that there was an ongoing dispute between the Employer and the Union and its striking West Chester employees, and that it would be unrealistic to conclude that such a dispute would not be extended to encompass nearby facilities like the one at Parkesburg. Consequently, we are not faced with the picketing of a neutral employer. Also, contrary to the dissent, we find it inconsequential to our determination that Touchton was not provoked into making his threatening remarks by Givler, the guard, or the dog. While such provocation would be material to determining that there were mitigating circumstances to the misconduct, the issue here presented is not mitigation or justification, as the dissent suggests, but whether on the facts before us Touchton lost the protection of the Act during a moment of misconduct which did not entail physical acts or gestures.

⁶ On June 8, the Union and a number of its members, including Touchton and Scott, the other discriminatee herein, were found in contempt of an injunction by the Pennsylvania Court of Common Pleas. At the contempt hearing, counsel for the Union consented to a contempt order provided that none of the named defendants were thereby admitting the truth of the assertions made by Respondent with regard to the individual defendants, or admitting that any of them had violated the criminal law. We find that the Pennsylvania Court of Common Pleas' contempt order does not relate to the issue of whether Touchton's or Scott's conduct was sufficiently egregious to deny them the protection of the Act. See *W. C. McQuaide, Inc.*, *supra* at 594.

⁷ We note that on review the Third Circuit disagreed with the Board in *W. C. McQuaide, Inc.*, *supra*. See *N.L.R.B. v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977). However, that case is factually quite different from the instant case. There, the court denied reinstatement to one of the strikers, Lavelly, finding that Lavelly (1) followed a nonstriker to a delivery point and said that he would "get him"; (2) shook his fist at a truckdriver and said that he would "knock the g— d— sh— out of [him]" if he drove again; and (3) told another truckdriver "Scab, you're going to get yours," and partially blocked his egress. The court carefully noted that the statements were made in the context of a strike marked by incidents of vandalism and harassment, and were, under the circumstances in which they were made, more than spontaneous picket line activity. Here, Touchton's threats were picket line rhetoric, made under circumstances where there was no reason to believe that they would be carried out. Such threats are not so egregious as to warrant the denial of reinstatement.

II. James R. Scott

As previously noted, we agree with the Administrative Law Judge that Respondent violated Section 8(a)(1) by its discharge of James Scott. At the hearing, Respondent basically contended that picketer Scott, from inside his camper, said to Supervisor Anthony Talamonti as the latter walked by, "watch your house, pussy—we are going to get you"; that Talamonti then walked to Respondent's office, where he told Supervisor-Dispatcher Ralph Oestreich of the threat; that Talamonti returned to the camper 15 minutes later to talk with Scott; and that Scott then assaulted Talamonti with a knife. However, the Administrative Law Judge did not credit most of Respondent's version of the events in question, finding instead that, while Scott had made the threat, Talamonti had returned to the camper after a 15-minute hiatus in order to assault Scott, and that Talamonti had drawn a knife on Scott.⁸ Based upon the foregoing, the Administrative Law Judge concluded that (1) but for the knife fight, Scott would not have been discharged; (2) Respondent therefore had no honest belief that Scott had engaged in such misconduct as to disqualify him for reinstatement under *N.L.R.B. v. Burnup & Sims*, 379 U.S. 21 (1964); and (3) in any event, the General Counsel had successfully shouldered the burden of proving that Scott did not engage in disqualifying misconduct under *National Aluminum, Division of National Steel Corporation*, 242 NLRB 294 (1979).

Our dissenting colleague states that he sees "no practical difference between Scott's threat to Tala-

⁸ Towards the end of his Decision, the Administrative Law Judge stated "I have credited Talamonti's testimony . . . [as to] Talamonti's conduct up to the appearance of Scott at the rear of the camper." In fact, earlier in his Decision, the Administrative Law Judge made several credibility findings which varied from Talamonti's version of this event. The Administrative Law Judge found that Talamonti returned to the camper seeking to physically confront Scott, and that Talamonti told union agent Larry O'Connor that he "wanted that fuzzy face m—f—. I'm going to kill him." Talamonti, on the other hand, testified that he was angry when he returned to the camper, but that he wanted to "see if he [Scott] meant it" and to "find out what this guy is talking about." Talamonti further testified that he told O'Connor "I don't mind all this bull s— that's going on here but they should leave the families out," and that O'Connor told him "don't do anything foolish." Even accepting Talamonti's testimony up to the appearance of Scott at the rear of the camper, we would find that Scott's alleged misconduct did not disqualify him for reinstatement.

Additionally, in the "Respondent's Version" section of his Decision, the Administrative Law Judge stated that "the above-credited testimony" is the result of various witnesses of the General Counsel and Respondent. It is unclear what the Administrative Law Judge meant by this statement; however, it would appear that the Administrative Law Judge did not intend to reach a final credibility resolution at this point in his Decision, considering that the testimony to which he was referring appears in "Respondent's Version," and that much of it is specifically discredited later in the Decision. Rather, it is apparent that his final resolutions are in the section entitled "Discussion and Conclusions; the May 31 Discharge of Scott," which he begins with the sentence "From the widely divergent testimony of the General Counsel's and Respondent's witnesses, I conclude that the following occurred."

monti, and Touchton's threat to Givler" The difference is that Respondent did not discharge Scott because of his threat to Talamonti, but because of a whole series of events beginning with the threat and ending with a supposed knife attack. This version of the events, centering on Scott's alleged assault of Talamonti, was advanced by Respondent in both the injunction hearing and at every step of the instant case. At no time has Respondent ever argued that it discharged Scott solely—or primarily—because of his initial threat.⁹ In contrast, Respondent has never alleged any grounds for Touchton's discharge other than his remarks to Givler. Since the Administrative Law Judge discredited Respondent's version of the knife fight, and specifically found that Talamonti was in fact the aggressor, we agree with the Administrative Law Judge's finding that Scott would not, but for the knife fight, have been discharged. We therefore adopt the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) by its discharge of Scott.¹⁰

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusions of Law 3 and 4:

"3. The General Counsel having proved a *prima facie* case of the unlawful discharge of striking employee Robert J. Touchton, Respondent has failed to sustain its burden of proof upon a preponderance of the evidence that it had an honest belief that employee Touchton engaged in acts of such misconduct on the picket line as to render him unsuitable for further employment, and therefore violated Section 8(a)(1) by discharging Touchton on June 11, 1979.

"4. The General Counsel having proved a *prima facie* case of the unlawful discharge of striking employee James R. Scott, Respondent has failed to sustain its burden of proof upon a preponderance of the evidence that it had an honest belief that employee Scott engaged in acts of such misconduct on the picket line as to render him unsuitable for further employment, and therefore violated Section 8(a)(1) by discharging Scott on June 11, 1979."

AMENDED REMEDY

In view of the foregoing finding that Respondent violated Section 8(a)(1) by discharging Robert J.

⁹ This discussion should not imply that we agree with our dissenting colleague that Scott's threat to Talamonti disqualifies him from employment.

¹⁰ In his recommended Order, the Administrative Law Judge found that Respondent should make James Scott whole for any loss of earnings commencing May 31, 1979. In fact, the correct date should be June 11, 1979, the date of Scott's discharge. We have therefore modified the Administrative Law Judge's Conclusions of Law, recommended Order, and notice accordingly.

Touchton on June 11, 1979, we shall order Respondent, in addition to adopting those remedies provided in the Administrative Law Judge's recommended Order,¹¹ to cease and desist from the unfair labor practices found and to take the following affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to offer reinstatement to employee Robert J. Touchton to his former job or, if it no longer exists, to a substantially equivalent position, displacing if necessary any employee assigned to such a position, without prejudice to Touchton's seniority or other rights and privileges, and to make him whole for any losses he may have suffered as a result of the unlawful interference with his rights. All such losses are to be reimbursed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).¹²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, A. Duie Pyle, Inc., West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer to Robert J. Touchton and James R. Scott immediate and full reinstatement to their former jobs or, if they no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings commencing on June 11, 1979, in the manner set forth in the section of this Decision entitled 'The Remedy' as amended by the Board."

2. Insert the following as paragraph 2(b) and re-letter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharges of Robert J. Touchton and James R. Scott on June 11, 1979, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them."

¹¹ As previously noted, we find that James R. Scott should be made whole for any losses commencing June 11, 1979, and not May 31, 1979, as erroneously stated by the Administrative Law Judge.

¹² In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

3. Substitute the attached notice for that of the Administrative Law Judge.

CHAIRMAN VAN DE WATER, dissenting:

Contrary to my colleagues, I would find, in agreement with the Administrative Law Judge, that Touchton forfeited his right to reinstatement by virtue of his picket line misconduct. Thus, as found by the Administrative Law Judge, Touchton threatened the home of a nonstriking employee (Givler) with arson, telling him that, "Your house is on fire," and that "if it is not now, it will be on Saturday." Pointing out that the Board rule in such matters is that, in order to support a lawful discharge, verbal abuse or threats to nonstrikers must be accompanied by physical acts or gestures that would provide added emphasis to the words, the Administrative Law Judge nonetheless concluded that Touchton had lost his right to reinstatement, relying to some extent on the special meaning of the threat to Givler, whose house was historically unique. The Administrative Law Judge also concluded, and I agree, that Touchton's threat was the coercive equivalent of the physical acts and gestures required by the Board to support the discharge of a striker for threats or verbal abuse to a nonstriker.¹³

My colleagues appear to argue that Touchton's conduct is excusable as an act of "animal exuberance." I disagree. The record reflects, and the Administrative Law Judge found, that Respondent's Parkesburg facility was not organized, nor were those employees on strike. The Union had, however, instituted a picket line at the Parkesburg warehouse. Givler, who worked at Parkesburg, had transferred from the West Chester facility 2 years earlier, where he had been part of a carpool which included Touchton.

On the night in question, Givler was in the Parkesburg warehouse, along with a guard (Ramsbottom), when they heard noises (such as persons beating on a steel surface) emanating from the junction of the state highway and the entrance road to Respondent's warehouse. Givler accompanied Ramsbottom and Ramsbottom's German shepherd guard dog to see if the cause of the noise could be determined. There is no contention, however, that the dog assumed a threatening stance or otherwise intimidated the pickets. Indeed, inasmuch as it was dark, Touchton inquired if, in fact, the guard had brought a dog with them. When the guard approached to about 10 feet of Touchton's

voice, Touchton threatened to shoot the dog, although there is neither evidence nor contention that the dog threatened Touchton in any fashion, or that Touchton could even see the dog. Immediately after Touchton threatened to shoot the dog, he began to threaten Givler's house with arson, although, again, there is no evidence that Touchton was in any way provoked—either by word or deed. Neither can it be argued that Touchton acted on impulse in response to seeing strike replacements crossing the picket line—a common catalyst for "impulsive acts" by striking employees. Thus, as noted above, the Parkesburg employees were not on strike, and Givler was neither a former striker who had returned to work nor a striker replacement. Finally, and most important, the record is clear that neither Givler, the guard, nor the dog acted in any fashion so as to warrant Touchton's threats. Thus, while the label of "animal exuberance" may properly be applied elsewhere, the circumstances of Touchton's conduct do not warrant such a vindication. Accordingly, I would find that his discharge did not violate the Act.

In addition, and in opposition to my colleagues, I would find that striking employee Scott also forfeited his right to reinstatement when he told a supervisor (Talamonti), "Watch your house pussy—we are going to get you." As a result of Scott's words, and as found by the Administrative Law Judge, Talamonti, "from whatever internal or external stimulus, became enraged over Scott's repeated threat which he [Talamonti] reasonably construed as being directed against his home and family." (ALJD, sec. III, C, 3, par. 3. Emphasis supplied.)

The Administrative Law Judge further found that Talamonti, having been verbally provoked by Scott, physically assaulted Scott after a 15-minute hiatus. The Administrative Law Judge relies on this hiatus to find that Talamonti had "no legal right to assault Scott," and further concludes that, but for the fight, Scott would not have been discharged; that Respondent had no honest belief that Scott had engaged in such physical misconduct as to cause him to lose the protection of the Act; and that, in any event, Scott did not, in fact, engage in disqualifying conduct.¹⁴

¹³ The Administrative Law Judge also noted that the record reveals a background of violence, wherein "union agents and striking employees appear to have attacked and destroyed Respondent's property including breaking truck windows, assaulting drivers of customers' trucks, and threatening customers crossing the picket line."

¹⁴ Although Talamonti was "out-of-line" when he assaulted Scott, the record reflects that he was not entirely unprovoked. Thus, according to the credited testimony, when Talamonti returned to the trailer to see Scott, and although Scott heard, while in the trailer, Talamonti tell the union organizer that he (Talamonti) "wanted that fuzzy faced m—f—. I'm gonna kill him," Scott, rather than remaining out of sight until Talamonti's wrath subsided, opened the door of the trailer and addressed Talamonti with, "What do you want, m—f—." Taken in conjunction with Scott's earlier threat against Talamonti's home and family, it is not surprising that Talamonti acted as he did.

I do not agree, and conclude that Scott's threat also formed the basis for his discharge. Thus, Scott received the same investigatory and discharge letters as Touchton, who also "only" made a verbal threat—which I would find to be the coercive equivalent of a physical assault. What is more telling in this regard, however, is the fact that Terminal Manager James Latta III, the son of Respondent's president, and who was present at the fight, did not discharge Scott "then and there." Thus, rather than concluding that Latta's failure to fire Scott on the spot implied only that Respondent did not consider the fight serious enough to warrant discharge, I believe that Respondent's course of conduct in sending its investigatory letter on June 1 was also indicative of its intention to consider all aspects of Scott's May 31 conduct, including his threat against the home and family of Talamonti.

Having so concluded, I see no practical difference between Scott's threat to Talamonti, and Touchton's threat to Givler—except perhaps that Scott did not enlighten Talamonti as to the means to be used to effect the promised damage to Talamonti's home. Like Touchton's threat, Scott's threat to Talamonti is the coercive equivalent of the physical act, and outside the protection of the Act. I would therefore find that Respondent had an honest belief that, by virtue of this threat, Scott had engaged in misconduct sufficient to remove him from the protection of the Act, and that Scott did, in fact, engage in such misconduct.

Finally, I note that Scott's threat (and Touchton's) was not just picket line rhetoric made under circumstances where there was no reason to believe that such threats would be carried out. The record reflects, rather, that the threats made by Touchton and Scott were articulated on the same day, against a background of property destruction, assault, and other, additional threats.¹⁵ By virtue of this background, there was every reason to believe that such threats would be carried out. Thus, the rights guaranteed by Section 7 of the Act do not nullify the responsibility that the striking employee must bear for his or her unprotected acts, or the consequences that must flow therefrom.

For the reasons articulated above, the conduct of Touchton and Scott was, in the circumstances of

this case, beyond the protection of the Act. I would not, therefore, find that Respondent violated Section 8(a)(1) of the Act when it discharged them for having engaged in such conduct.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or discriminate against any employee because he engages in the protected concerted activity of engaging in a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer to Robert J. Touchton and James R. Scott immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements, and WE WILL make them whole for any earnings lost as a result of our unlawful conduct against them, plus interest, according to the law.

WE WILL expunge from our files any references to the discharges of Robert J. Touchton and James R. Scott on June 11, 1979, and WE WILL notify each of them that this has been done and that evidence of this unlawful discharge will not be used as a basis for further personnel action against him.

A. DUKE PYLE, INC.

¹⁵ Note too, that the Union agreed to the entry of an injunction on May 25, 1979, which prohibited, *inter alia*, more than four pickets at any one time at Respondent's facilities. The Union further agreed that the injunction continue until a hearing to be held on June 8. On June 1, however, the day after the events described above, Respondent petitioned the court for a finding of contempt, naming, among others, Touchton and Scott. At the June 8 hearing, the Union consented to a finding and order of contempt (although it did not admit to the truth of Respondent's assertions), and a contempt order issued on June 8, prohibiting the named individuals (including Touchton and Scott) from coming within one block of Respondent's premises.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: Pursuant to charges filed and served August 21, 1979,¹ by Local 312, International Brotherhood of Teamsters, herein called the Union, a consolidated complaint and notice of hearing was issued against A. Duie Pyle, Inc., herein called Respondent, on October 31, 1979. Respondent's duly filed answer admitted various allegations of the complaint but denied the commission of unfair labor practices. The issues raised by the pleadings, in substance, were whether Respondent violated Section 8(a)(1) of the Act, as amended (29 U.S.C. Sec. 151, *et seq.*) by discharging and failing to reemploy two of its employees, Robert J. Touchton and James R. Scott, who were engaged in picketing. Respondent's principal defense was that both Touchton and Scott, who it knew were pickets and whom it admitted discharging on June 11, 1979, were discharged for having engaged in activities of such a flagrant nature as to render them unacceptable as employees thereby rendering the discharges not violations of Section 8(a)(1) of the Act as alleged.

Pursuant to prior notice, a hearing was held before me in Philadelphia, Pennsylvania, on April 10 and 11, 1980. All parties were represented by counsel,² were provided the opportunity to present written and oral evidence, to make motions, to call, examine, and cross-examine witnesses, and, at the conclusion of the hearing, to argue orally on the record. Oral argument was waived and since the close of the hearing, the General Counsel and Respondent submitted briefs.

Upon the entire record, including the briefs, and upon my careful observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that, at all material times, Respondent, a Pennsylvania corporation, maintains its principal office and place of business in West Chester, Pennsylvania, where it is engaged in the business of intrastate and interstate transportation of freight and of warehousing. During the 12-month period prior to issuance of complaint, a representative period of Respondent's business operations, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and, in the same period, derived gross revenues in excess of \$50,000 from the transportation of freight and commodities from the Commonwealth of Pennsylvania directly to points outside that State. Respondent admits and I find that it is and has been, at all material times, an employer

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A LABOR ORGANIZATION

Respondent admits, and I find, that at all material times, Local 312, International Brotherhood of Teamsters, the Charging Party herein, has been and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent maintains in Chester County, Pennsylvania: two facilities: in West Chester, a facility (Resp. Exh. 2) composed of two warehouse buildings on the right side of Garfield Avenue when viewed from a position south to north and on the left side of Garfield Avenue, an office building, a shipping and receiving dock, and a shop. The two warehouse facilities are slightly to the north of the three facilities above named. In fact, directly across Garfield Avenue from the two warehouse buildings is an employer known as Balleymore Company which maintains a parking lot on the south side of its building across the street from and just north of Respondent's shop building. In addition, Respondent maintains, in Parkesburg, Pennsylvania, some 20 miles distant from the West Chester facility, a large warehouse facility. That warehouse is parallel to and not less than 300 feet from Pennsylvania State Highway 372 with which it is connected by a road of not less than 300 feet in length. At the end of that road is a fence and gate surrounding Respondent's Parkesburg facility.

Since about 1943, three separate units of employees in Respondent's West Chester facility have been represented by the Union as the recognized bargaining representative. Respondent's employees at the Parkesburg facility are not represented.³

With the expiration of its collective-bargaining agreement in or around March 1979, the Union and its members commenced, on May 21, 1979, an economic strike and picketing at Respondent's West Chester facility, with picketing also instituted at the Parkesburg facility. Thereafter, pursuant to allegations of mass picketing, threats of violence, and blocking of egress and entrance into Respondent's premises, Respondent successfully sought, in the equity division of the Court of Common Pleas in the Commonwealth of Pennsylvania, Chester County, an injunction, granted May 25, 1979, restraining the Union from acts of intimidation, mass picketing, threats, coercion, and violence at Respondent's facilities in West Chester and in Parkesburg. No picketing was permitted in excess of four pickets at any location at any one time at any of the entrances to Respondent's premises. It further appears (Resp. Exh. 1) that counsel for the Union agreed to the entry of the aforesaid injunction to contin-

¹ Unless otherwise noted, all dates are in 1979.

² Counsel for the Union withdrew from the hearing shortly after the opening and before testimony was taken, after moving my acceptance of a private settlement agreement between Tipton, the Union, and Respondent, and dismissal of the complaint with regard to Tipton. I denied the motion on the General Counsel's objection that the proffered "settlement" *inter alia*, failed to provide for making Tipton whole or for posting of the customary notice.

³ The General Counsel does not deny Respondent's assertion that, pursuant to Board-conducted decertification elections in 1979, the Union has been decertified in all three units in Respondent's West Chester facility.

ue until a hearing thereon scheduled for Friday, June 8, 1979.

It is also conceded that, on June 1, 1979, Respondent petitioned for a finding of contempt of the injunction order naming not only the Union but 3 of its agents, including trustee Lawrence O'Connor, along with the two alleged discriminatees herein and some 30 other members of the Union who were engaged in alleged acts of misconduct on the picket line. The court issued a Rule To Show Cause returnable June 8, 1979, and thereafter a hearing was held on that date. A transcript of the proceedings of that June 8 contempt hearing (Jt. Exh. 4, pp. 5-6) shows that Respondent represented to the court, *inter alia*, that employee James Scott, a truckdriver, possessed and used a sheath knife with a blade of 4 or 5 inches in an altercation with Respondent's supervisor (assistant operations manager) Anthony Talamonti,⁴ at the West Chester facility on May 31, 1979; and that, on the same day, at the Parkesburg facility, Respondent's employee, Robert Touchton, threatened an employee, Edward Givler, with the words: "Givler, your house is on fire." And thereafter he was heard by another person to remark: "If it is not now, it will be." Counsel for the Union, at that hearing, consented to a finding and order of contempt provided, however, that none of the named defendants were thereby admitting the truth of the assertions made by Respondent with regard to the individual defendants, and particularly any admission that any of them violated criminal law. Nevertheless, union counsel admitted (Jt. Exh. 4, p. 11) that a finding of contempt could be found against the individuals and Local 312. On June 8, the court entered an order extending the injunction 30 days from June 8, 1979. The General Counsel does not deny that the state court adjudicated the Union and the particular employees to be in contempt of the injunction order. The contempt order is not in the record but the General Counsel did not deny that, pursuant to the June 8 contempt proceeding, the Union's picketing was reduced from four pickets at any location to two pickets and that the named individuals, including Touchton and Scott, were adjudicated in contempt and forbidden to come within one block of Respondent's premises.

On June 1, 1979, Respondent, by West Chester Terminal Manager James Latta III (son of Respondent's president, James Latta, Jr.), sent identical letters to its employees James Scott and Robert J. Touchton (Jt. Exhs. 2 and 3), which letters advised them that Respondent did not "condone the violent activities which occurred on May 31, 1979"; was investigating those activities; and would notify Touchton and Scott of any disciplinary action, including possible discharge, resulting from that investigation. Copies of the letters were sent to the Union.

Lastly, on June 11, James Latta III sent identical letters to Touchton and Scott (Jt. Exhs. 5 and 6) advising them that, as a result of the investigation, Respondent concluded that they had engaged in picket line "violence"; that the finding of contempt in the Chester County of Common Pleas confirmed that conclusion;

and Touchton and Scott were discharged effective "immediately."

Respondent does not deny that at the time it discharged Touchton and Scott, those two persons were its employees, were engaged in picketing pursuant to an economic strike against Respondent, and so known by Respondent. The strike ended on August 20, 1979.

In *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) the Supreme Court set forth the rules regarding procedure and the burden of proof in cases involving the discharge of pickets where, as here, the employer alleges that the cause of the discharge was not the picketing but rather unlawful conduct which strips the pickets of protection of the Act and renders them unfit for further employment by the employer. *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975), *enfd.* in pertinent part 552 F.2d 519 (3d Cir. 1977).

In order to prove a *prima facie* case of unlawful discharge, the General Counsel must establish that a violation of Section 8(a)(1) occurred because (a) the employees, to Respondent's knowledge, were engaged in the protected concerted activity of a lawful economic strike; and (b) Respondent discharged the strikers (or failed to reinstate the strikers upon their unconditional offer to return), *N.L.R.B. v. Burnup & Sims, supra* at 22-23. In the instant case, Respondent admits that the employees were strikers, were known as such to Respondent at the time that it discharged them, were engaged in an otherwise lawful economic strike, and Respondent discharged the strikers for alleged misconduct associated with their picketing activity. Under such circumstances, the General Counsel has made out a *prima facie* case and I so find.

The parties further appear to agree that, in this type of case, pursuant to the rule of *Rubin Bros. Footwear, Inc.*, 99 NLRB 610-611 (1952), and its qualifications on the burden of proof and the burden of going forward, *N.L.R.B. v. Burnup & Sims, supra* at 23, fn. 2, the burden of going forward with the evidence to rebut this *prima facie* case then shifts to Respondent to establish that it held an "honest belief" that the discharged striking employees engaged in misconduct of such a serious character as to lose the protection of Section 7 of the Act and to justify Respondent in denying them their jobs. *Rubin Bros. Footwear, Inc., supra*, 611; *Huss & Schlieper Company*, 194 NLRB 572, 577 (1977).

Once having established such an "honest belief," Respondent is absolved from liability, *National Aluminum, Division of National Steel Corporation*, 242 NLRB 294 (1979), except where the General Counsel thereafter successfully shoulders the further burden of affirmatively proving that the discharged employee did not, in fact, engage in the conduct for which they were discharged, or proves, in the alternative, that the conduct was not sufficiently grave as to warrant the discharges. *Rubin Bros. Footwear, Inc., supra* at 611; *Moore Business Forms, Inc.*, 224 NLRB 393 (1976). The burden of rebutting the General Counsel's denials then shifts to Respondent. As noted in *American Cyanamid Company*, 239 NLRB 440 (1978), the mere fact that there was substantial misconduct engaged in by some strikers, and the alleged discriminatees' proximity thereto, does not impute culpability

⁴ Talamonti assigned work to Scott on a daily basis

to any particular strikers unless they were identified, in some way, as a responsible party in the misconduct. *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973); *Moore Business Forms, Inc.*, *supra* at 395, *enfd.* in this regard 574 F.2d 835 (5th Cir. 1978).

Thus, except in the cases where Respondent proved no honest belief of striker misconduct, what remains is to determine whether (a) the particular alleged discriminatee engaged in the asserted misconduct; and (b) if so, whether the act was sufficiently serious as to deny the employee the continued protection of the Act or should be characterized as merely a "trivial rough incident or a moment of animal exuberance." *W. C. McQuaide, Inc.*, 220 NLRB 593, 594, citing *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). Thus not all picket line misconduct removes the protection of the Act from the striker.

B. The Discharge of Robert J. Touchton

Edward Givler, employed at Respondent's Parkesburg facility as a warehouseman and truckdriver, had been employed, since 1972, at the West Chester facility but had transferred in 1977 to Parkesburg. He knew Touchton in West Chester while he worked there and in fact carpooled with Touchton for about 3-1/2 years on a daily basis to and from work at the West Chester facility. After Givler transferred to Parkesburg, he saw Touchton only when he visited the West Chester warehouse.

In 1971, Givler purchased a stone house built in 1736 in Wagonstown, Pennsylvania, for about \$40,000 and thereafter, to the present, spent about \$60,000 in its repair and constant personal renovation. It is uncontested that his purchase of this house and its unique quality were known in the community and to many of his co-employees. I conclude that, on the basis of their daily meetings subsequent to 1971, Touchton knew of Givler's pride in ownership of this house.

As above noted, although employees of the Parkesburg facility were not represented by the Union, and were not on strike, the Union nevertheless picketed the Parkesburg facility. At 5:45 p.m. on May 31, 1979, Givler saw two cars at the main gate at Parkesburg, one of which was Robert Touchton's beige Volkswagen. At 9 p.m., while they were in the warehouse, Givler and Ken Ramsbottom, a guard employed by a private guard service, heard noise (such as persons beating on a steel surface) down at the junction of the state highway and the entrance to the road to Respondent's plant. Givler accompanied Ramsbottom down toward the road to see what the noise was. Ramsbottom was accompanied by a German shepherd guard dog. Givler said he positively identified Touchton's voice and heard Touchton yell to inquire if the guard had a dog. When Ramsbottom approached to about 10 feet of the voice, the voice threatened to shoot the dog. Touchton then yelled: "Givler, your house is on fire." Within a few minutes, Ramsbottom asked Givler if indeed he had a house and Givler told him that he had. Thereafter, from the same distance of 300 feet, Touchton yelled on two more occasions, "Givler, your house is on fire." After the third time that Touchton yelled that Givler's house was on fire, he said that Givler was a bastard. Ramsbottom testified without

contradiction that between the first and second times that Touchton yelled that Givler's house was on fire, Touchton also yelled, "If not now, it will be on Saturday." Ramsbottom told this to Givler and then called his superior who called the state police. Givler asked the police to keep an eye on his house and thereafter asked his father to do the same, and kept a loaded shotgun in the house. He reported this May 31 event to James Latta, Jr., president of the Company, on the same evening that it occurred.

This May 31 report by Givler to the president of the Company resulted, on the next day, in James Latta, Jr., writing to Touchton (Jt. Exh. 2) of his investigation into the events of the prior night and the possibility of future discipline. As above noted, on June 11, pursuant to the alleged investigation, Latta discharged Touchton.

Givler was positive he recognized Touchton's voice. Touchton did not testify.⁵

The only two witnesses relating to this event were therefore Givler and the guard Ramsbottom. The General Counsel produced no witnesses with regard to the matter. It therefore appears that the resolution of the lawfulness of the discharge becomes a matter of law as to whether Respondent, under Board decisions, against a background of picket line violence could lawfully discharge Touchton for making such statements to Givler. The only other factual elements relating to this question were (1) the testimony of James Latta, Jr., who testified that he discharged Touchton because the matter was not denied during the June 8 contempt hearing, because he felt the Company would have to take a position on such threats, and particularly because his own home had been the object of arson, 1 year before Touchton's threat, wherein the perpetrator, a nonemployee, was sentenced to a prison term of 30 to 60 years; and (2) the record herein which shows a background of violence wherein union agents and striking employees appear to have attacked and destroyed Respondent's property including breaking truck windows, assaulting drivers of customer's trucks, and threatening customers crossing the picket line.

As the court of appeals notes in *N.L.R.B. v. W. C. McQuaide, Inc.*, *supra*, at 527, there is a dispute among the courts of appeals concerning the legal standard applicable in deciding whether a particular statement by a striker to an employee renders the striker subject to discharge. Whatever the wisdom of "subjective" or "objective" standards, the Board rule, as stated in *McQuaide, Inc.*, 220 NLRB 593, 594, is that to support a lawful discharge, verbal abuse or threats to nonstrikers must be accompanied by "physical acts or gestures that would provide added emphasis to [the] words" The General Counsel cites *Associated Grocers of New England*, 227 NLRB 1200, 1203 (1977), and cases cited therein as affirming the Board's view which, of course, I am bound to follow. *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963).

Such a rule has no application to a threat of arson as here. Unlike a threat to kill nonstrikers crossing a picket

⁵ According to the General Counsel, Touchton refused to appear and testify because he gained new employment and feared that his testifying might jeopardize his new job.

line, as in *Associated Grocers of New England*, at 1207, which threat was "unaccompanied by physical acts or gestures," a threat of arson cannot reasonably be so accompanied.

In the instant case, however, the record supports the inferences, which I draw, that the unique quality of Givler's ancient house was a matter of widespread knowledge in the community and that Touchton knew of it. I further infer, as the General Counsel concedes (br., p. 9) that it was on the basis of these facts that Touchton made this particular threat—arson—rather than, for instance, an innocuous threat to kill, as in *Associated Grocers of New England*, *supra*. Thus, I do not hesitate to conclude that there existed here conduct which was a coercive equivalent of the "accompanying physical acts or gestures" conduct which "... added emphasis or meaning to words. . . ." *Associated Grocers of New England*, *supra* at 1207. In short, the seriousness of Touchton's threat of arson to Givler depends neither on the intrinsic depravity of the threatened act nor on Givler's reaction (procured a firearm; complained to police, etc.) but on the special meaning, of the threat known to and Givler regarding the uniqueness of the house and Givler's preoccupation therewith.

On such facts, it is unnecessary to reach or analyze the effect of James Latta, Jr.'s own special reaction to a threat of arson, even one made to another person, due to his having recently been victimized by arson.

I reject the General Counsel's assertion that Touchton's discharge was based on the June 8 contempt finding rather than on the May 31 threat. Contrary to the General Counsel, Respondent threatened to discharge Touchton because of the "incidents . . . on May 31, 1979 . . ." (Jt. Exh. 2) and did so on June 11 because "[Respondent has] concluded that you did in fact participate in such violence."

As the Board specifically held, in *W. C. McQuaide, Inc.*, 220 NLRB 593: "Certainly Respondent's awaiting of the determination of the merits of its contempt petition before making a decision affecting the employment status of the strikers cannot be faulted."

I place no reliance on the contempt proceedings or the finding of contempt entered against Touchton and Scott, especially since the order was entered by the court accepting union counsel's express reservation that no findings on the particular alleged criminal conduct be made on his consent to the conclusion of contempt.

I therefore reject the General Counsel's arguments that: (1) the reason for the Touchton discharge was the contempt finding; (2) the threat was insufficient because, unaccompanied by physical acts or gestures, there was no sense of immediacy or credence; and (3) the context of the threat was not in the midst of other unfair labor practices. In fact, acts of violence on the same day pervade the record.

I shall recommend to the Board, therefore, that the complaint alleging the unlawfulness of Touchton's discharge on June 11, 1979, be dismissed.

C. The Discharge of James R. Scott

Respondent did not discharge Scott until June 11. However, it produced background evidence relating to

incidents on May 23 and June 5 which allegedly surrounded the principal reason for the June 11 discharge: Scott's conduct on May 31. During daylight hours on May 23, as Respondent's employee George Hadgson credibly testified, he saw Scott approach a Continental Can truck and speak to the driver at the driver's door while the truck was moving very slowly at Respondent's gate entering the West Chester warehouse. He heard Scott say to the driver that the driver "... must not like living. You might get your truck wrecked." Hodgson said that the driver, the traffic manager of Continental Can Company, said nothing in return. Scott did not specially deny the incident although he denied generally making such threats to a driver he spoke to. Respondent, however, failed to explain why the driver who received this statement from Scott was not called to corroborate it other than that the case was expected to be settled and therefore there was no time to bring in the witnesses other than witnesses under its control.⁶

That same night, May 23, about midnight, at the Parkesburg facility, Respondent's witness Henry Wahls testified that he told Scott to move off the property his camper-truck which was parked on Respondent's property. In response to this, Scott told him: "You wait till we get back; we'll get even."

Wahls also testified that at the West Chester facility, on June 5, while a customer's (Cohnstann) truck was approaching the West Chester facility, Scott spoke to the driver and Wahls told the driver to come in and not to worry about Scott. At that point Scott jumped off the truck running board and called Wahls, who wears glasses, a "four-eyed m/f." Scott admitted telling him that and also, in substance, admitted telling him to get inside the warehouse. Wahls testified that Scott preceded his statement by asking Wahls if he "wanted to stay healthy," and then said that he should get into the warehouse. Scott denied that introductory remark but admitted telling Wahls to get back into the warehouse "where he belongs." In view of the lack of contest that Scott was red faced and furious in screaming at Wahls, I would credit Wahls' version of the remark and conclude that Scott added the statement: "If you want to stay healthy."

Finally, on May 24, according to A. Duie Latta he saw Scott on the picket line at the West Chester facility and testified that a customer, Diane DeFeo, pulled into the warehouse driving a large jeep-type vehicle. He said that he heard Scott utter the words, "... smash windshield." Within a few seconds, DeFeo told Latta that Scott had asked her: "How would you like your windshield smashed." As in the case of the traffic manager of the Continental Can truck, Respondent failed to produce Diane DeFeo with regard to the May 24 incident.

⁶ The General Counsel made the same assertion with regard to the General Counsel's failure to produce certain witnesses, as will be discussed below.

The May 31 Scott Incident

1. Respondent's version

Respondent, however, claimed it terminated Scott for the occurrence on May 31, 1979 (Jt. Exhs. 3 and 6). The testimony of Respondent's witnesses on this occurrence consisted of the testimony of Anthony Talamonti, Respondent's night supervisor; James Latta, Jr., the terminal manager; Ralph Oestreich, a supervisor dispatcher; an employee (truckdriver) and former member of the Union, Michael Ranieri; and a salesman, A. Duie Latta.

Respondent's witnesses, as well as witnesses for the General Counsel, state that at or about 5 p.m. on May 31, Anthony Talamonti walked south from the warehouse gate toward the office, cut across Garfield Avenue placing himself within 10 feet of Scott's camper truck, parked in the Ballymore parking lot across the street from the warehouse gate (Resp. Exh. 2). Talamonti said, and Scott denied, that as he passed, he heard Scott's voice from within the truck say to him: "Watch your house, pussy—we are going to get you." Talamonti said that he walked a further 10 feet, returned to the camper and at the camper window asked, "What did you say?" He heard Scott repeat the statement. Talamonti continued about 200 feet south on Garfield Avenue and entered the office of the West Chester terminal. He said that he was upset and told Supervisor-dispatcher Ralph Oestreich of the substance of what Scott said. Oestreich testified that Talamonti told him: "That they are going to burn [my] house."⁷ Indeed, thereafter, Oestreich said that when he told this to James Latta III (who was then in the nearby dispatch room) he told Latta only that Talamonti said that he had been "threatened." In any event, Oestreich testified that he told Talamonti to forget it, but Talamonti told Oestreich that he was going back to see if Scott meant what he said. From the time witnesses saw Talamonti emerge from the warehouse gate and walk past the camper, to the time that Talamonti walked 200 feet back to the camper to see if Scott meant it, consumed about 15 minutes. I credit the General Counsel's witness Wilson who observed Talamonti walking quickly with an angry "charging bull" expression. O'Connor and Wilson walked from the warehouse picket line toward Talamonti, and O'Connor asked Talamonti what he wanted.

As Talamonti was approaching the camper, Oestreich had already told James Latta III of Talamonti's departure. Latta, who suffers difficulties in his legs, drove his car the 200 feet up to the parking lot and parked in the Ballymore parking lot. Within a few seconds, Oestreich followed in another car seeking to protect Latta.

When Talamonti got to the vicinity of the camper, its back doors were shut and he saw union agent Larry O'Connor there. It was at that time that James Latta III drove up. Talamonti testified that he told O'Connor who

was at the rear door of the camper, that he did not mind all the bullshit . . . but that they ought to leave families out of it. O'Connor told Talamonti: "Don't do anything foolish."⁸ Scott credibly testified he heard O'Connor, across the street on the picket line, ask Talamonti what he wanted "up here" and that Talamonti answered: "I want that fuzzy face motherfucker. I'm gonna kill him." Strikers Ranieri and Wilson left the warehouse picket line and crossed the street, approaching the camper. Talamonti said that at that moment the rear door opened, he saw other persons in the camper and he smelled beer.

Scott emerged on the step beneath the rear door of the camper and said, "What do you want, motherfucker?" When Talamonti said that Scott should leave families out of the disputes, Scott was standing on the rear step of the camper holding a partially concealed hunting knife. According to Talamonti, Scott then lunged at Talamonti with a 4- or 5-inch blade sheath knife in his right hand. Talamonti says he reached out and pulled Scott out of the camper by Scott's beard meanwhile grabbing Scott's right hand (which held the knife) in his left hand. Either at that time or at a subsequent lunge by Scott, Talamonti said he was cut in his index finger by Scott's knife. At this point, there is no dispute he held Scott by his beard and wrestling and kicking occurred with Talamonti attempting to kick Scott. James Latta III attempted to get between them and when he did so this gave Talamonti enough opportunity to back off. Talamonti then pulled out a folding knife from his pocket and said "come on." Talamonti said that Scott did not approach him at this point but said to him: "You motherfucker. I'll own this Company now." When Latta told him to get into Latta's car, Talamonti told him to go fuck himself. Talamonti then walked to the office where employee Marlene Harkins allegedly bandaged his bleeding left index finger. The above-credited testimony is the result and product of the testimony not only of the General Counsel's witnesses, including Scott, but also of James Latta III, Oestreich, and employee Ranieri.

In particular, Ranieri testified that, on May 31, he was still an employee of the Company and had been picketing since the commencement of the strike on May 20. He testified that, on May 31, he drank beer in the Scott camper in the afternoon, that pickets had been drinking beer for much of the day both in the camper and in a nearby bar, and that at 5 p.m. he was on the picket line with Roy Wilson at the West Chester warehouse. Wilson testified that he directed Ranieri to picket down at the office and that he may not have been near the camper during the fight; but Ranieri testified that he saw Scott holding a knife in his right hand and that the knife had a serrated edge. Finally, Ranieri insisted that he saw Scott lunge at Talamonti with the knife.

Respondent's witnesses testified not only that they smelled beer but, contrary to Scott, that there were cases of beer in the back of the camper when the door opened.

⁷ The General Counsel attacks Oestreich's credibility on his testimony that Talamonti said that Scott threatened to "burn" Talamonti's house whereas Talamonti apparently told Oestreich merely that the threat was merely "Watch your house, pussy . . . we are going to get you." I am not impressed with the distinction the General Counsel draws or his suggestion that Oestreich was confused by the Touchton threat of arson, *supra*.

⁸ The General Counsel failed to produce union agent O'Connor as a witness in this matter. The General Counsel stated that he had telephoned O'Connor and the Union but that O'Connor never returned his phone calls.

2. The General Counsel's witnesses

Scott's testimony as to what occurred earlier on the morning of May 31 was not denied in rebuttal by the General Counsel's witnesses. Scott said that on Wednesday, May 30, he and union agent O'Connor followed Oestreich and Talamonti in their attempts to deliver freight by truck to various terminals in the Philadelphia area; that because O'Connor complained to several terminal shop stewards and other persons who were members of the Teamsters when the attempts to deliver the freight were made, Oestreich and Talamonti were not successful in delivering the freight. Next morning, May 31, Scott, on the picket line, said that he told Talamonti, in a mocking fashion, a common taunt which supervisors made over a period of years to Respondent's truckdrivers: that no truckdrivers could make any money hauling freight around all day and, failing to deliver it to the consignee, brought it back to the terminal in an unload condition. Scott said that when he told this to Talamonti, Talamonti cursed at him, but the curse did not include any threat. Similarly, prior picket line exchanges between the two were limited to obscene remarks.

At noon that day, Scott went to a nearby bar, the Shingle Lounge, and waited there until about 4 p.m. He remained at the bar with other pickets and drank only beer, according to him not in excess of four cans of beer during the 4-hour period. At or about 4:15, picket Davie entered the bar and told Scott of a shortage of pickets at the West Chester facility. Scott, Ranieri (seated in front with Scott), a young lady, and pickets Robert Laloup and Davie (in the rear of the camper) drove to the West Chester facility and parked in the nearby Ballymore parking lot, opposite and across Garfield Avenue from the two warehouses. Scott entered the rear of the camper. Ranieri testified that he then joined picket Roy Wilson across the street at the warehouse picket line. Wilson testified that he thereafter told Ranieri to picket at the office gate and that Ranieri did so. The evidence shows, however, that no General Counsel's witness could state where Ranieri actually was and did not successfully contradict Ranieri's testimony. I find that Ranieri, in any event, saw the above-described knife fight.

Scott testified that it was Talamonti rather than himself who opened the door at the back of the camper. Although the resolution is not controlling, I credit Talamonti. In particular, Scott denied ever having a knife at that time although he admitted having a hunting knife with a 4-inch blade which, contrary to Ranieri's statement, did not have a serrated edge. While Talamonti told Scott that he should not threaten "my wife and my kids," Scott told Talamonti that he had never done so. At that moment Talamonti grabbed him by the beard and pulled him out of the camper. Scott said that he tried to yank himself free of Talamonti's grasp but he was successful only when Talamonti had pulled part of his beard out and started to kick him. At this point Scott testified that Talamonti backed away, pulled out a pocketknife, said "come on, goddamnit" and that James Latta said, at this point "... let them go." When the knife was exposed, Scott said that he said to Talamonti:

"Tony—you've had it now." Scott said that he then went to the police station and reported the matter.

Scott testified that in the contempt hearing appearances of June 8, although he heard the reference by Respondent's lawyer to his possessing a knife, he never specifically admitted it but merely agreed with the union lawyer, Muller, that a deal had been made and that they would merely concede the contempt.

Finally, there is no dispute that, in late August 1979, Scott telephoned Duie Latta and asked to return to work; and if there was no such return, he wanted to get his personal goods from Respondent's truck. Although Duie Latta told him that he would contact him in a couple of days, Respondent never contacted Scott. On September 6, Scott and Touchton wrote to Respondent formally requesting reinstatement and reemployment. They did this in spite of receiving, on or about June 11, letters notifying them that Respondent had discharged them.

The testimony regarding the drinking of beer by Ranieri, Scott, and others present at the Shingle Lounge and in the back of Scott's camper truck on May 31 is in dispute. There is no dispute that some beer was drunk, but Respondent does not assert that either Scott or anybody else was drunk from the effects of beer drinking or that any hard liquor was consumed on that day. The most that was said was that O'Connor, the truck, and Scott smelled of beer.

3. Discussion and conclusions; the May 31 discharge of Scott

From the widely divergent testimony of the General Counsel's and Respondent's witnesses, I conclude that the following occurred:

In agreement with Respondent, I find that at about 5 p.m. on May 31, 1979, Scott, on two occasions from his camper, did tell Talamonti, "Watch your house, pussy, we're going to get you"; that Talamonti then walked to the office, told Oestreich of the threat, and Oestreich told Latta III⁹; and that after about 15 minutes, Talamonti walked up to the camper seeking Scott.

On the other hand, on what I regard as the reasonable and proper view of the evidence and the circumstances, on my observation of Talamonti, and on Wilson's credited testimony regarding Talamonti's expression and appearance as he approached the camper, I conclude that Talamonti, from whatever internal or external stimulus, became enraged over Scott's repeated threat which he reasonably construed as being directed against his home and family.

Contrary to Respondent's assertion and Talamonti's testimony that he returned to the camper to "see if [Scott] meant it" or "... to see what the problem was up there," I conclude that Talamonti angrily returned to

⁹ I reject as entirely speculative, and unsupported by the evidence, the General Counsel's argument (br. p. 16) that Oestreich and Latta III (whether or not Talamonti heard Scott's threat, but assuming someone did intentionally stir up Talamonti, covertly urging a confrontation. Oestreich credibly testified to the contrary. However, as noted in the text, above, I am actually not called upon to resolve the source or mechanics of Talamonti's anger.

the camper after "pondering the fault more" seeking to physically confront Scott. I also credit Scott in that he heard O'Connor, near the camper, then ask Talamonti what he wanted and Talamonti responded that he "... wanted that fuzzy face motherfucker. I'm gonna kill him."

I further find, in accordance with Talamonti's testimony, that Scott opened the rear door of the camper, rested on the rear step and greeted Talamonti with: "What do you want, motherfucker." At this point, Talamonti quickly admonished Scott against involving families in the dispute and, despite any attempted Scott denial, grabbed Scott's beard and commenced kicking at him. Thereafter, Latta III separated them and Talamonti drew his folding work knife.

Under this view of the facts, which I hold, it is immaterial whether Scott drew and then lunged with the much disputed hunting knife.¹⁰ If he did not have the knife, Respondent's defense of discharging Scott for this May 31 knife incident would amount to the concoction the General Counsel asserts. If Scott did have the knife—and used it—I conclude that, under the circumstances, he was justified in defending himself against Talamonti, an obviously larger and powerful man who was clearly enraged apparently by Scott's threats. If Scott then used a knife to defend himself, it was his right. Moreover, it does not undermine that right because (1) he did not await Talamonti and defend himself (with or without a knife) inside the camper, or (2) attempt to avoid the confrontation by locking the back door (assuming this could be done).

In short, Talamonti returned to the camper looking for vindication, specifically including using physical force on Scott. I do not assert that, under circumstances of a strike marked by violence and the threat against his family, he was not without emotional justification in returning to assault Scott. Yet, as I view Talamonti's legal obligation, he could have and should have followed other courses of action including engaging the police and discharging Scott. Legally, Talamonti's acts may not be condoned.

That Scott, with too many beers, may have acted with excess force or unwisely is not the issue. Finding, as I have, that Scott verbally provoked Talamonti, but did not physically provoke him, in the threats from the camper, Talamonti had no legal right after 15 minutes of hiatus to physically assault Scott.

Under the above circumstances, I conclude that, but for the "knife fight," Scott would not have been discharged; that even if Scott used a knife, Respondent had no honest belief that Scott had engaged in such physical misconduct as to disqualify him as to lose the protection of Sections 7 and 13 of the Act, *N.L.R.B. v. Burnup & Sims, supra*; *W. C. McQuaide, supra*; and in any event, the General Counsel successfully shouldered the burden of proving that Scott did not, in fact, engage in disqualifying misconduct. *National Aluminum, Division of National Steel Corporation*, 242 NLRB 294.

Two elements require further observations: (1) Nothing in the contempt transcript (Jt. Exh. 4) or in the order

therefor demonstrates any admission or finding of fact that Scott used a knife or, in any event, engaged in physical misconduct. There are merely allegations and a finding of contempt. Union counsel expressly reserved the point that the "statements" were true (Jt. Exh. 4). This fact makes the following dictum in *W. C. McQuaide, Inc.*, 220 NLRB 593, 594, apply here *a fortiori*. In fact, in *McQuaide*, at 594, fn. 7, as here, the state court adjudicated contempt but made no findings of fact. Even so, the Board announced the wider principle in dictum, that it would not "... abdicate [to another forum] its statutory responsibility" to construe conduct under the terms of the Act even if the other tribunal "... found that the conduct in question occurred," *McQuaide, supra* at 594. Here, the Pennsylvania court made no findings.

In short, Respondent's reliance on the Pennsylvania court of common pleas contempt adjudication as indicative, much less binding, on a conclusion under the Act is misplaced.

(2) It is true that the General Counsel failed to produce a close-in witness—indeed almost a participant—in the knife fight: union agent O'Connor. Respondent requests that I draw an inference adverse to the General Counsel for failure to produce a witness, an agent of the Charging Party, whose testimony would be expected to be favorable to the General Counsel's cause in general and Scott's in particular; and that the failure to produce him assumes major negative significance.

The General Counsel failed to produce him because he failed to respond to the General Counsel's phone calls, failed otherwise to appear voluntarily, all apparently because the Union was decertified and lost interest in prosecuting the case on behalf of employees who no longer supported it. It is clearly arguable that, if the Union had lost interest, O'Connor's testimony would become even more valuable since, discounting his adversary interest, he might be expected to offer a less jaundiced recollection than if he maintained an interest. Thus, if the General Counsel could be faulted for failing to produce an apparently favorable *interested* witness, the fault would exist *a fortiori* if the interest were eliminated. Whether the General Counsel might have to subpoena O'Connor would not detract from the obligation to produce him. *International Union, UAW [Gyrodyne Co.] v. N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972).

On the other hand, it is not clear (in the absence of evidence of the General Counsel's specific refusal to call O'Connor) what O'Connor's testimony, unfavorable to Scott, would be. I have credited Talamonti's testimony both regarding Scott's initial provocative threats from the camper and Talamonti's conduct up to the appearance of Scott at the rear of the camper. To the extent that Respondent insists that Scott drew, presented, and used a knife on the then unarmed Talamonti, I have concluded such a circumstance, if true, to be immaterial. Thus, even were I to consider drawing an inference generally adverse to the General Counsel from his unsupportable failure to call O'Connor, there is no specific fact to which O'Connor might testify on which to rest the adverse inference. Since the drawing of the inference is not mandatory, there must be some rational basis ad-

¹⁰ Ranieri identified it as having a serrated edge; Scott said his knife had a clean edge, not serrated.

vanced on which to support the position. Mere general suspicion would seem an insufficient basis. Thus, I conclude that, here, no adverse inference need be drawn.

Moreover, even if some generalized adverse inference were drawn, in the absence (as here) of some suggestion from Respondent concerning what support it seeks from such disposition, I would nevertheless reach the same conclusion. The most obvious element, of course, would be that Scott was armed and lunged at Talamonti. In view of my specific conclusion that Talamonti was the legal aggressor, I have concluded that Scott's reactions were immaterial.

CONCLUSIONS OF LAW

1. Respondent, A. Duie Pyle, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 312, International Brotherhood of Teamsters, the Union herein, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel having proved a *prima facie* case of the unlawful discharge of striking employee James R. Scott, Respondent has failed to sustain its burden of proof upon a preponderance of the evidence that it had an honest belief that employee James R. Scott engaged in acts of such misconduct on the picket line as to render him unsuitable for further employment and Respondent therefore violated Section 8(a)(1) by discharging him on May 31, 1979.

4. Respondent, having proved by a preponderance of the evidence that it held an honest belief that on May 31, 1979, its employee Robert J. Touchton engaged in unprotected activities on the picket line, that such conduct rendered him unsuitable for further employment, and that it discharged him for those reasons, did not violate Section 8(a)(1) of the Act.

5. Respondent has engaged in unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

In order to effectuate the policies of the Act, I find it necessary that Respondent be ordered to cease and desist from the unfair labor practices found and to take certain affirmative action, including offering reinstatement to employee James R. Scott to his former job or, if it no longer exists, to a substantially equivalent position, displacing if necessary any employee assigned to such a position, without prejudice to his seniority or other rights and privileges, and to make him whole for any losses he may have suffered as a result of the unlawful interference with his rights. All such losses are to be reimbursed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).¹¹ I shall further order that Respondent post an

appropriate notice. See *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER¹²

The Respondent, A. Duie Pyle, Inc., West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or discriminating against any employee for having engaged in a lawful strike or other concerted activity protected under the provisions of Section 7 of the National Labor Relations Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Offer to James R. Scott immediate and full reinstatement to his former job or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings commencing May 31, 1979, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its West Chester, Pennsylvania, place of business copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹¹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).